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No. 86-376

# In The Supreme Court Of The United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
*Petitioner,*

v.

EARL BADGETT,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

## REPLY MEMORANDUM FOR THE STATE OF CONNECTICUT

JOHN J. KELLY
Chief State's Attorney

JOHN M. MASSAMENO
Assistant State's Attorney
Senior Appellate Attorney
Counsel of Record

Division of Criminal Justice
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373

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## REPLY MEMORANDUM FOR THE STATE OF CONNECTICUT

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## I. THIS CASE FALLS WITHIN THE EXCEPTIONS TO THE FINAL JUDGMENT RULE RECOGNIZED IN *COX BROADCASTING CORP. V. COHN,* 420 U.S. 469 (1975)

As the record makes clear, after finding a Fourth Amendment violation, the Connecticut Supreme Court remanded this case to the trial court for a determination of whether the inculpatory evidence should nevertheless be suppressed at trial by reason of the inevitable discovery rule recognized by this Court in *Nix v. Williams,* 467 U.S. 431 (1984). Pet. App. at 21a–23a. The respondent claims that these further proceedings render the state supreme court's judgment non-final, depriving this Court of jurisdiction to pass upon the questions presented. *See* 28 U.S.C. § 1257.

This case falls within the third exception to the final judgment rule recognized in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975): "[W]here the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. First, contrary to the respondent's contention, the decision below "finally decided" the federal claim. The respondent argues that the further proceedings ordered in this case "relate[ ] to the constitutionality under the fourth amendment of the instant search." Br. in Opp. at 6. This characterization of the Connecticut Supreme Court's decision is simply wrong. The court unquestionably concluded that "the evidence [was] unlawfully seized from the vehicle"; Pet.'s App. at 21a; and it is clear that an inquiry under the "inevitable discovery" exception to the Exclusionary Rule presupposes a Fourth Amendment violation. *Nix v. Williams,* 467 U.S. 431, 443 (1984). The record demonstrates that the Connecticut Supreme Court finally decided the federal claim.

Moreover, the third exception recognized in *Cox* is applicable because, if the state prevails on the remand, it cannot appeal therefrom. The absence of "aggrievement" precludes any appeal in the state court system. *See* Conn. Prac. Bk. § 4000; *Delevieleuse v. Manson*, 184 Conn. 434, 436, 439 A.2d 1055 (1981). Since a party who prevails cannot be "aggrieved" by a trial court judgment, and since a petition for a writ of certiorari must be sought with respect to the judgments of the highest court of a state; 28 U.S.C. § 1257; further review cannot be had if the state prevails in subsequent state court proceedings.

If the state loses on the remand, the judgment of conviction, which is conditioned upon an *adverse* ruling on the respondent's suppression motion, would necessarily be vitiated. *See* Conn. Gen. Stat. § 54-94a (appeal permitted after plea of nolo contendere conditional where suppression motion denied). The case would have to be dismissed by the trial court for insufficient evidence. Further review by appeal would be barred by the doctrine of res judicata, however, because the issue the state would seek review of (the validity of the auto search conducted in this case) already has been finally decided by the state's highest court in this case. *See State v. Wilson*, 180 Conn. 481, 485–87, 429 A.2d 931 (1980). Moreover, a decision by the Connecticut Supreme Court that an appeal by the state after remand proceedings would be barred by the doctrine of res judicata would itself constitute adequate independent state grounds precluding review by certiorari. *See Herb v. Pitcairn*, 324 U.S. 117, 125–6 (1945). Thus, this case would fit within the third exception to the final judgment rule identified in *Cox;* review of the important federal questions presented in this case is either now or never.

Even if later review by certiorari could be had in this case, however, the fourth exception to the final judgment rule set out in *Cox* would warrant consideration of this petition at this time. That is so because (1) the federal issue has been finally decided; (2) the state might prevail in further proceedings on grounds different from the federal question already resolved

(rendering unnecessary review of the federal issue by this Court); (3) reversal of the state supreme court on the federal issue would be preclusive of any further litigation in this case; and (4) a refusal to review the decision at this time "might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 482–83.

The petitioner has already addressed the finality of the state supreme court's resolution of the federal claim. *See infra* at 2. The only other component of the fourth exception recognized in *Cox* that the respondent appears to challenge is whether some federal policy would seriously be eroded if review by this Court were deferred.

As this Court observed in *New York v. Belton*, 453 U.S. 545 (1981), uncertainty in the law that controls the search of an automobile after the roadside arrest of its operator can only undermine effective law enforcement and jeopardize protection of Fourth Amendment rights. *Id.* at 458–60. And while this Court has sought to clarify the applicable law; *ibid;* the ruling of the court below casts doubt on the requisites of an inventory search as well as the meaning of the "substantial contemporanety" component of the search incident to arrest exception to the warrant requirement. Because delay in the resolution of the questions presented would require state law enforcement officials to operate on a daily basis in the shadow of a confusing and constitutionally suspect state court interpretation of the federal constitution, and because the other prerequisites to review under the fourth exception to the final judgment rule recognized in *Cox* have been satisfied, the questions presented should be reviewed.[1]

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[1] This Court's decision in *Flynt v. Ohio*, 451 U.S. 619 (1981) does not militate toward a different result. In *Flynt* the heart of the prosecution, i.e., whether the material alleged to be obscene was in fact obscene, remained to be resolved by the state courts. Whether prosecution of Flynt was selective and discriminatory, as he alleged in his certiorari petition, was closely related to the larger unresolved First Amendment issue.

*(continued)*

## II. BECAUSE THE CONNECTICUT SUPREME COURT ELECTED TO PASS UPON THE QUESTION WHETHER THE AUTO SEARCH WAS REASONABLE UNDER THE FOURTH AMENDMENT AS AN INVENTORY SEARCH, THIS COURT HAS JURISDICTION OVER THE FIRST QUESTION PRESENTED

The respondent correctly points out that, although the trial court predicated its decision in part on the alternative ground that the search could be justified under the Fourth Amendment as an inventory search, the petitioner relied in its brief on appeal upon the other bases of the trial court's decision. App. to Br. in Opp. at 1A. Nevertheless, at oral argument before the state supreme court the petitioner did press the inventory exception to the warrant requirement. This fact is confirmed by the supreme court's opinion. Pet.'s App. at 20a ("[t]he state also contends that the warrantless search and seizure of the contents of the black bag were constitutionally permissible in order to inventory the contents of the vehicle"). In any event, the supreme court fully addressed the applicability of the inventory exception in this case. *See* Pet.'s App. at 20a–21a.

The respondent nevertheless contends that this Court should not address the first question presented because, he claims, the petitioner did not press it before the state supreme court. Br. in Opp. at 14–15.

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[1] (continued)

In this case the central issue, whether the Fourth Amendment was violated by the action of the police, has finally been resolved in the state courts. Further proceedings cannot illuminate that issue or render it any less significant to the administration of criminal justice in Connecticut.

Similarly, in *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. 621 (1981), the Court simply could not reach the federal question presented because proceedings ordered by the state courts could have altered substantially the factual predicate of the federal question (whether a taking under the Just Compensation Clause of the Fifth Amendment had in fact occurred).

As this Court has clearly said, however,

> "[s]ince the state court deemed the federal constitutional question to be before it, we could not treat the decision below as resting upon an adequate or independent state ground even if we were to conclude that the state court might properly have relied upon such a ground to avoid deciding the federal question." *Beecher v. Alabama*, 389 U.S. 35, 37 n.3, 19 L. Ed. 2d 35, 88 S. Ct. 189 (1967). This is merely an application of the "elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134, 58 L.Ed.2d 1245, 34 S. Ct. 874 (1914).

*Orr v. Orr*, 440 U.S. 268, 274-5 (1979).

The first question presented, which was passed upon below, is properly before this Court.[2] *See Illinois v. Gates*, 462 U.S. 213, 218-22 (1983).

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[2] Although the petitioner does not consider response by separate argument on the merits to be warranted here, it does bring to the Court's attention a recent decision of the Ninth Circuit that confirms the importance of the first question presented relating to inventory searches. In *United States v. Feldman*, 788 F.2d 544 (9th Cir. 1986), the court, confronted with an "on-the-spot" inventory search similar to the one conducted here, concluded that the police department's conferral of "complete discretion [upon] its officers to decide when and where to inventory the contents of [an impounded vehicle]" did not render the search unreasonable under the Fourth Amendment. *Id.* at 551. Rather, drawing upon the Fifth Circuit's decision in *United States v. Prescott*, 599 F.2d 103, 105-106 (5th Cir. 1979), the court acknowledged that it is the " 'increasingly common practice for police to conduct inventory searches of vehicles incident to their impoundment' "; *id.* at 552 (citation omitted); and went on to say that "standard police practice" under *Opperman* could exist " 'in the sense that [the search involved] was of the type repeatedly recognized by the courts as efficacious and constitutionally reasonable.' " *Ibid.* (citation omitted). Finally, the court concluded: "[s]wift and effective actions by an officer to secure a gun which he or she reasonably believes to be in an empty impounded car should be recognized as 'standard police procedure' for inventory search purposes as much as rote adherence to established written inventory procedures validated in *Opperman*." *Ibid.*

## CONCLUSION

For these reasons, and those set out in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted.

THE STATE OF CONNECTICUT
Petitioner

BY: JOHN M. MASSAMENO
Assistant State's Attorney
Senior Appellate Attorney
Counsel of Record

Division of Criminal Justice
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, Connecticut 06492
(203) 265-2373

*With Whom On The Brief:*

JOHN J. KELLY
Chief State's Attorney

JOHN T. REDWAY
State's Attorney

JUDITH ROSSI
Deputy Assistant State's Attorney

October, 1986